No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,
Petitioner,
v.
McLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION, CONGRESSMEN HENRY J. HYDE, JACK F. KEMP, NORMAN D. SHUMWAY, ROBERT S. WALKER, GEORGE C. WORTLEY, ROBERT E. BADHAM, DONALD E. "BUZ" LUKENS, WILLIAM E. DANNEMEYER; SENATORS JESSE HELMS, GORDON J. HUMPHREY, STEVE SYMMS; THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are described in Appendix A hereto.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in respondent's brief.

SUMMARY OF THE ARGUMENT

The issue presented in this case is fundamentally a question of separation of powers and fidelity to the rule of law. *Amici* submit that *Runyon v. McCrary*, 427 U.S. 160 (1976) should be reconsidered and overruled or modified because it is a clear misinterpretation of the intent of the Congress that enacted 42 U.S.C. § 1981, and because *stare decisis* concerns are not compelling in this case.

The language of Section 1981, which quite often is ignored in judicial interpretations, clearly shows that the rights guaranteed were of the nature of legal capacities, including the capacity to contract. The legislative history of Section 1981, whether derived from the Thirteenth or Fourteenth Amendments, further demonstrates that intent. Nevertheless, by providing freedmen with these legal capacities, Section 1981 enabled private wrongdoing to be redressed without the tortured reading that petitioner gives to the "right to contract" clause.

Stare decisis, which is rooted in the stability of the law, is not compelling here precisely because *Runyon*

gives Section 1981 an unsettled reading. Finally, Congress has not "affirmatively endorsed" *Runyon* or other decisions interpreting Section 1981. The legislative activity cited by the petitioner is equivocal at best, but in any event, is no substitute for the proper exercise of congressional powers under Article I of the Constitution. This Court should not usurp the role of Congress even if some of its members may be willing to shirk their legislative responsibility to make the hard policy decisions.

ARGUMENT

I. CONGRESS INTENDED THAT SECTION 1981 REMOVE ONLY LEGAL DISABILITIES IMPOSED BY THE STATES AND SUCH A READING OF THE LAW HAS HAD THE EFFECT OF REMEDYING BOTH PUBLIC AND PRIVATE DISCRIMINATION.

A fundamental principle of statutory interpretation is that courts are to examine the words that the legislature chose in framing the law and to give those words their ordinary and plain meaning as they were understood at the time they were used. *See Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 166 (1980) (statutes must be interpreted "in light of the intent of the Congress that enacted them"). A corollary rule is that the words of the statute are to be read in the context of the entire statute in question. It is only when those words are unclear or their meaning ambiguous, either by themselves or in context with the rest of the statute in question, that a court should look outside the statute to discern what the Congress meant by the language it selected.

Although these rules of statutory construction are basic, *amici* find it necessary to repeat them because they are disregarded by the petitioner. In her 118-page brief, the petitioner's methodology of discerning congressional intent is, as she puts it, "an essentially pragmatic one." Pet. Brief at 40. That is, faced in 1866 with evidence of wrongdoing by private individuals against the freedmen, did the 39th Congress intend to outlaw only public discrimination by passing the 1866 Act? Accordingly, petitioner's brief first discusses the existing conditions that the freed slaves faced (Pet. Brief at 14-40), and then it analyzes the congressional debates on the bill (Pet. Brief at 41-71). We are also told what the editorial writers of certain newspapers felt about the legislation. (Pet. Brief at 49). The remainder of the brief deals with the legislative acquiescence of later Congresses and the *stare decisis* doctrine.

Notably absent in all of this is any discussion and analysis of the language of Section 1981 itself. *Amici* believe it is imperative that any judicial interpretation or re-interpretation of Section 1981 must begin—and indeed may even end—with the language Congress chose. The law as *written* is what this Court is required to interpret. As Justice Stevens, speaking for the Court in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), stated: "It is our task to give effect to the statute as enacted."[1]

Accordingly, *amici* will first examine the language of Section 1981, and then discuss the congressional debates and the context in which the law was passed, including subsequent litigation, to demonstrate that Congress intended to provide the freedmen with important legal capacities.

A. The Language of Section 1981

Section 1981 states in full:

> All persons within the jurisdiction of the United States shall have the same right in every State and

[1] *Id.* at 819. In *Mohasco*, Justice Stevens gave a literal reading to the filing requirements of the Civil Rights Act of 1964 and rejected a *pro se* discrimination complaint as untimely even though the lower court's more equitable interpretation of the Act would be faithful to "the strong federal policy of insuring that employment discrimination is redressed." *Id.* at 813. The Court ruled that the word "filed" used in two separate subsections of the same statute must be given the same meaning.

> Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The key phrase in question is the "right . . . to make and enforce contracts."[2] These precise words are crucial to a proper understanding of the statute. Grammatically, the rights declared are cast in infinitive phrases, *e.g.*, "to make and enforce contracts," "to sue, be parties, give evidence." As this statute is discussed and analyzed in various cases, however, the Court and the parties quickly deviate from this original language and begin discussing this phrase as if it were a gerund, *i.e.*, that 1981 prohibits discrimination "in the *making* and enforcement of private contracts." *Runyon v. McCrary*, 427 U.S. 160, 163 (1976). (Emphasis added.)

The gerund is often converted into a noun when we are told that Section 1981 prohibits "employment discrimination." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 459, 460 (1975). Thus, the language of § 1981 has undergone a judicial metamorphosis such that the "right to make" no longer reflects the right or capacity "to do" something; rather, it has come to mean an ongoing process by the use of a gerund—"no discrimination in the *making* and enforcement of a contract—as well as "employment," a noun denoting a status or relationship. *Amici* believe that this deviation from the actual language of Section 1981 has caused some of the difficulties in applying it to cases such as this.[3]

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[2] More accurately, the phrase under scrutiny is simply the "right . . . to make . . . contracts" since all parties would agree that the "right to enforce" contracts means only the right to enforce the contract in a court. As such, that right cannot be infringed by private persons once a contract has been made.

[3] That is why we find petitioner in this case struggling to fit her allegations that she was harassed during the performance of her job into the language of the statute. She does this by creating the fiction that her single at-will contract with her employer is really a new contract to be made every day, and that her agreement to work each day with the possibility of being harassed is apparently a condition precedent to her acceptance of a daily contract to work. *See* Transcript of Oral Argument at 10 (Feb. 29, 1988). This novel theory obviously gave the Court some difficulty and the Court alluded to it as one of the reasons that caused it to rebear this case and reconsider *Runyon*. *See Patterson v. McLean Credit Union*, 108 S.Ct. 1419 (1988). If a single contract at-will can be construed to be multiple contracts made each work day, as petitioner contends, why not construe it as multiple contracts made each hour (since the employee is likely to be paid by the hour), *ad infinitum*? In that way, the transformation of the phrase "to make a contract" into "performance of a contract" is complete.

Amici believe that the language of § 1981 cannot bear such construction and that claims for discrimination under the terms and conditions of employment, including harassment, are more properly covered by Title VII, 42 U.S.C. § 2000e-2 and related state claims, such as tortious interference with contractual rights, or breach of implied duty of good faith in the performance of a contract.

As Justice White clearly put it in his dissent in *Runyon*:

> On its face the statute [which] gives "[a]ll persons" . . . the "*same right* . . . to make . . . contracts . . . as is enjoyed by white citizens" clearly refers to rights existing apart from this statute. Whites had at the time when § 1981 was first enacted, and have [today]. . . . no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract. . . . What is conferred by 42 U.S.C. § 1981 is the *right*—which was enjoyed by whites—"to make contracts" with other willing parties and to "enforce" those contracts in court.

427 U.S. 160, 193-94 (emphasis in original).

Slaves were considered chattel or property and thus had no legal rights or capacities whatsoever. Section 1 of the Civil Rights Act of 1866 gave the freed slaves both citizenship and the natural rights that go along with that status. The right of a citizen to "make a contract" means the legal capacity to accept offers or to make them,

but not the right to compel others to accept offers or make them.[6]

That Justice White was correct in characterizing the "right . . . to contract" as a legal right or capacity to contract is evidenced by examining the other "rights" provided in Section 1981. For example, all persons are given the "right . . . to sue, be parties, give evidence, and to [enjoy] the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons. . . ."

It is evident that the other "rights" provided by Section 1981 involve rights that affect the legal status or capacity of the person. Those rights can only be affected by the state rather than by private individuals.[6]

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[6] Even as a matter of simple contract law, the majority in *Runyon* erred. The Court stated that the private schools "advertised and offered" its "educational services" to "members of the general public" through the Yellow Pages and brochures addressed to "resident." 427 U.S. at 166, 172. The Court thus characterized the school as the "offeror" and the public as "offerees." *Id.* at 171. However, it is well-settled under contract law that advertising does not constitute an "offer." *See* Restatement (Second) on Contracts, §§ 26, 26, Comment b. At best, it is a solicitation for offers from those who read the advertisements. *See Steinberg v. Chicago Medical Soc.*, 69 Ill. 2d 320, 371 N.E. 2d 634, 639 (1977). Indeed, in common parlance, an applicant (offeror) may have his or her application "accepted" by the school (offeree). The private school is not bound to accept all the offers made to it. Even after the school has accepted the offer, the offeror is usually not bound under normal contract rules to the contract, but instead is allowed a certain period of time within which to confirm or reject the contract. In such a case, the school does eventually extend a legal "offer." In any event, the plaintiffs in *Runyon* were at least one if not two transaction levels away from being considered an "offeror" as this Court mischaracterized them.

[6] Of course, if someone has the right to give evidence, that is, to testify in court, theoretically that right can be frustrated if the potential witness is kidnapped by private individuals to prevent the giving of the testimony at a particular proceeding. But those kinds of private wrongs are not addressed in this legislation but in other sections of the civil rights laws. *See, e.g.*, 42 U.S.C. § 1985(3).

Thus, to be internally consistent, the "right . . . to contract" must be interpreted in the same way as the other rights specified in § 1981. After all, if it is a rule of construction that the same word used twice in a statute should be interpreted the same way (*see Mohasco Corp. v. Silver, supra*), a word used only once ("right") should mean the same for all of its subsequent descriptive modifiers. Since those other rights indisputably refer to legal capacities, and the removal of legal disabilities, so too is the right to contract. No one could argue, for example, that since the freedmen have the "right to give evidence" or testify in court that a potential witness in a criminal or civil action could sue the prosecutor or attorneys involved for failing to call them as witnesses, alleging discrimination.[6]

B. The Legislative And Legal History Of Section 1981

Amici submit that because the language of Section 1981 is clear, there is no need to examine the legislative history of the measure. Nevertheless, an examination of that history clearly shows that Congress intended only to remove legal disabilities.[7]

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[6] Thus, if Section 1981 is interpreted to mean that discrimination is prohibited "in the making of a contract" so too must it be prohibited "in the giving of evidence" or in "testifying." Does a prosecutor risk violating Section 1981 or a private defense attorney for interrogating a black witness in a "harassing" manner? Are jury members liable for a suit under Section 1981 because it is alleged that the jurors gave more credence to the testimony of a white witness or party than a black one, or vice-versa? *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (white persons may invoke § 1981). Could a student of one race sue the school for discrimination under § 1981 because the student claims that he or she is being "disciplined" (harassed) more than students of a different race in performance of his or her educational contract? These issues will be further discussed below under the section on *stare decisis*.

[7] *Amici* agree completely with Justice White's analysis in *Runyon* of the legislative history of Section 1981 which shows that it is derived *not* from Section one of the Civil Rights Act of 1866, but from Section 16 of the Voting Rights Act of 1870 which was passed

1. *The Schurz Report.*

At the outset, *amici* do not dispute for the most part the historical picture painted by the petitioner of the abuses suffered by many of the former slaves in 1865 after they were freed. The petitioner cites at length the findings in the reports of General Carl Schurz and others which describe the various abuses committed by the former slave owners and others from the time of the slaves' emancipation toward the end of the Civil War until November, 1865. Pet. Brief at 16-40.*

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pursuant to the Fourteenth Amendment proscribing only discriminatory state action. 427 U.S. at 192. The petitioner's argument that the Reviser's marginal note in the Revised Statutes of 1874 captioned "equal protection of the laws" appeared after the 1874 law was revised (Pet. Brief at 6), does not diminish the unrefuted and unequivocal statements of Senator Stewart indicating that what is now Section 1981 applied only to state action. *Runyon*, 427 U.S. at 210.

Nevertheless, *amici* will demonstrate that even if Section 1981 is derived from *both* the Voting Rights Act of 1870 and the Civil Rights Act of 1866, *or* for that matter, from the Civil Rights Act of 1866 alone, the 39th Congress did not intend in 1866 to require unwilling parties to make private contracts. As even Justice Stevens clearly put it in his concurring opinion in *Runyon*:

> There is no doubt in my mind that that construction of the statute [that section 1 of the Civil Rights Act of 1866 prohibits private racial discrimination] would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence.

427 U.S. at 189-90. For an excellent scholarly discussion of the history of the Reconstruction legislation and criticisms of the rationale in *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968), *see* C. Fairman, *Reconstruction and Reunion* 1117-1258 (1971); Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89. *See generally* Belz, *A New Birth of Freedom: The Republican Party and Freedman's Rights, 1861-1866* (1976).

* S. Exec. Doc. No. 2, 39th Cong., 1st Sess.

The fact that the Congress was aware of these problems when it began in January 1866 to consider the Civil Rights Act, however, does not mean that the Congress intended to address all of those problems and their manifestations in one of the very first pieces of legislation that came before them. In addition, other legislation was proposed and some of it enacted into law between 1866 and 1875 which deals specifically with private discriminatory action. Thus, petitioner's "pragmatic approach" of discerning legislative intent is disingenuous, and does not take into account the fact that Congress does not fully address a problem all at once.

But as will be demonstrated below, even many of the problems referred to by the petitioners of private discrimination were able to be corrected by the Civil Rights Act of 1866 because of the right given to the freedmen to sue in courts and give evidence. Thus, although *amici* maintain that Congress only intended to remove legal disabilities of the freed slaves, that notion is not incompatible with the prospect that private discriminatory actions would also thereby be redressed. In *amici's* view, the traditional "either/or" question of "whether Section 1981 covers only state action or does it also prohibit private discrimination" is therefore misleading.

The debates of the 1866 legislation during the three months from the time the bill was introduced by Senator Trumbull on January 6, 1866, until the law was passed over President Johnson's veto on April 9, clearly show that the 39th Congress was attempting to remove or prevent the legal disabilities that were or might be placed in the way of the freed slaves.

To put this in perspective, after the 13th Amendment was ratified in December 1865, it was unconstitutional for slavery or involuntary servitude to "exist" except for punishment of a crime. While it was incumbent upon the reconstructed southern states to enact laws to protect

the newly freed slaves, many of these measures were thinly veiled disguises to perpetuate many features of the slave system. These "Black Codes" as they were called, were ostensibly enacted to protect the freed Negroes, but contained pernicious measures such as making vagrancy a crime and thereby subjecting the former slave to involuntary servitude.

The petitioner's brief attempts to downplay the problems that blacks faced by these legal disabilities by stating, for example, that at the time that General Schurz drafted his report in November 1865 detailing the post-war abuses in five southern states, there were only "scattered local ordinances in Louisiana and Mississippi, measures which Schurz acknowledged were as of yet 'mere isolated cases.'" Pet. Brief at 24.

The petitioner seriously mischaracterizes the thrust and import of the Schurz report, however, by attempting to show that private conduct rather than laws or regulations were of primary concern to Schurz (and inferentially, to the Congress). Much of the report, however, focused on these local ordinances and what they foreboded to the freed slaves if such laws were used to replace the old slave codes. Thus, rather than diminishing the impact of these regulations, Schurz quoted whole sections of them, some of which he noted "deserves careful perusal."[9]

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[9] Schurz Report at 23. Schurz highlighted the following regulations of a Louisiana town:

> Section 3. No negro or freedman shall be permitted to rent or keep a house within the limits of the town under any circumstances, and any one thus offending shall be ejected and compelled to find an employer or leave the town within twenty-four hours. The lessor or furnisher of the house leased or kept as above shall pay a fine of ten dollars for each offence.
>
> Section 4. No negro or freedman shall reside within the limits of the town of Opelousas who is not in the regular service of some white person or former owner.

Id. (emphasis in original).

Schurz was obviously concerned about the effect these laws and regulations had on the status of the freed slaves, and he had a clear sense that these regulations in Mississippi and Louisiana portended a bleak future for the blacks if other jurisdictions were to embark on the same path. It was in this context that Schurz stated:

> "It may be said that these are mere isolated cases; and so they are. But they are the local outcroppings of a spirit which I found to prevail everywhere."

Schurz Report at 25.

Thus, rather than finding Schurz dismissing these regulations as "mere isolated cases" as petitioner would have us believe (Pet. Brief at 24), we find Schurz sounding a warning note of state legislative activity to come.[10]

Of course, what Schurz was referring to was the soon to be enactment of the infamous Black Codes on a statewide rather than local basis. Indeed, Schurz's warning was correct, for *after* his report was finished, not only did South Carolina enact its Black Code, but similar ones were enacted at the end of 1865 by Louisiana, Mississippi, Alabama, and in early 1866 by Virginia, North Carolina, Georgia, and Texas. *See* Fairman, *Reconstruction and Reunion* 106 (1971)."

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[10] Schurz's report continues:

> [T]here are systems intermediate between slavery as it formerly existed in the south, and free labor as it exists in the north, but more nearly related to the former than to the latter, the introduction of which will be attempted. I have already noticed some movements in that direction, which . . . [the Louisiana] ordinances were the most significant. Other things of more recent date, such as a new negro code submitted by a committee to the legislature of South Carolina, are before the country. They have all the same tendency [as the municipal regulations of Louisiana], because they spring from the same cause.

Schurz Report at 23 (emphasis in original).

[11] Another example of the petitioner's mischaracterization of the Schurz report as emphasizing private wrongs rather than legal disabilities is the petitioner's cite to Schurz's report:

2. *Congressional Debates In The 39th Congress.*

An examination of the numerous statements made by the proponents of the Civil Rights Act of 1866 clearly demonstrates that Congress did not intend to require private individuals to contract with others, but rather intended to remove legal disabilities and to punish state officials for violating those rights. While the phrase "state action" was not used in those days, the key concern of the Congress after the Civil War was the constitutional limits of the federal government to interfere in state affairs."[11]

There is not a single unambiguous statement in the numerous debates which indicated that Congress intended to legislate beyond the state level and go so far as to regulate private contractual decisions. Such a notion would have sparked great debate."[12]

"[M]any ingenious heads set about to solve the problem, how to make free labor compulsory. . . ."

Petitioner's Brief at 22. What is ingenious is petitioner's convenient use of the ellipsis; the rest of the sentence of that excerpt reads: "by permanent regulations." Schurz Report at 22. The petitioner also ignores another relevant statement by Schurz who quotes Colonel Thomas's observations that the private prejudices are "apt to bring forth that sort of class legislation which produces laws to govern one class with no other view than to benefit another." Schurz Report at 21. (emphasis added).

[11] It is ludicrous, therefore, for amici Eric Foner, *et al.*, to argue that the framers "did not recognize the modern 'state action doctrine' as a possible . . . limitation on their power to redress civil rights violations." Brief at 11. While the framers could be easily forgiven for not understanding our "modern state action doctrine," they certainly understood the "old" state action doctrine and legislated in that context. The principal argument during the debates centered around Congress' constitutional power to "enter the domain of a State and interfere with its internal police, station, and domestic regulations." (Cong. Globe, 39th Cong., 1st Sess. 1120 (Rep. Rogers)).

[12] Where Congress legislated against private racial conduct, it clearly did so. *See, e.g.*, the Anti-Kidnapping Act of 1866, the Anti-Peonage Act of 1867 (*now* 42 U.S.C. § 1994), the Anti-Ku Klux

What one clearly finds in the debates is an attempt to codify the "natural rights" belonging to the freed slaves. Thus, the first section of the 1866 bill declares that "all persons born in the United States . . . are hereby declared to be citizens of the United States. . . ." While this declaration was later constitutionalized in the Fourteenth Amendment, the 1866 Act proceeded to declare what the natural rights were that were associated with citizenship. Those natural rights were described by Congressman James F. Wilson, House floor manager of the Civil Rights Act, and other proponents of the bill as they were described by Blackstone, Chancellor Kent, and other legal philosophers, *i.e.*, the "right of personal security" (legal enjoyment of his life and limb); "right of personal liberty" (described as a power of locomotion or travel); and "right of personal property" (to acquire and dispose of his acquisitions). Cong. Globe, 39th Cong., 1st Sess. 1118.

As Congressman Wilson stated:

> It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. . . . If the States would observe the rights of our citizens, there would be no need of this bill. . . . And if above all . . . the State should admit . . . that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might without doing violence to the duty devolved upon us, leave the whole subject to the several States. But . . . the practice *of* the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny.

Id. at 1117-18 (emphasis added)."[13]

Klan Act of 1871, 42 U.S.C. §§ 1985, 1986, and the Public Accommodations Act of 1875.

[13] *Amici* do not understand how *amici* Foner, et al., who cite only the last phrase of this passage "we must do *our* duty by supplying the protection which the states [sic] deny." Foner Brief at 10, can possibly claim that Wilson's statements support their

As one commentator put it, if the guarantee on the right to make and enforce contracts were viewed as prohibiting private discrimination,

> "the Bill would not only have effected a truly revolutionary change in the federal system but would also have been entirely inconsistent with the very natural rights theory which the Republicans sought to implement. . . ."

Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 Hous. L. Rev. 221 (1986).[14]

Numerous other statements by the proponents of the bill further demonstrate the state action nature of the measure. Typical is the statement of Senator Trumbull, the bill's sponsor:

> [The bill] will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between person on account of race or color shall be abolished.

Cong. Globe, 39th Cong., 1st Sess. 476.[15]

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argument that Congress intended to legislate against discrimination by private persons rather than by the state.

[14] The argument that the law was not needed to strike down the Black Codes because the military commanders under the Freedmen's Bureau had begun to enjoin the operation of some of those laws is misleading. *See* Foner Brief at 8. The Civil Rights Act was seen as legal mechanism to replace that military procedure in a comprehensive manner. As Congressman Thayer noted, the very fact that the military was attempting to deal with the Black Codes "demonstrates the necessity for enforcing the guarantees of liberty and of American citizenship conferred by the Constitution . . . [n]ot by military force . . . but through the quiet, dignified, firm, and constitutional forms of judicial procedure." Cong. Globe at 1155.

[15] *See also id.* at 474 (Sen. Trumbull); *id.* at 1118 (Rep. Wilson); *id.* at 1291 (Rep. Bingham); *id.* at 1293-1294 (Rep. Shellabarger).

Even after President Johnson's veto of the bill (which referred to the law as providing a "*capacity* to make a contract," Cong. Globe 1690) Senator Trumbull insisted in unambiguous language that:

> This bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.

Id. at 1761.

Petitioners are unable to refute or counter this clear and overwhelming evidence of legislative intent by the sponsor and supporter of the bill. Instead, they quibble with a bit or two of inconsequential legislative statements referred to in Justice Harlan's dissent in *Jones v. Alfred H. Mayer Co.*, claiming he is taking them out of context.[17]

Petitioner's reliance on the editorial comments by several newspapers on the bill as somehow evidencing Congressional intent to regulate private conduct is not only exceedingly weak, but inaccurate. For example, petitioner cites to the *Cincinnati Commercial* of March 30, 1866, raising the spectre of the bill applying to public accommodations such as hotels and theaters. Last minute

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[17] Thus, when Justice Harlan quoted an excerpt of Congressman Thayer's remarks about the "tyranny of laws," the petitioner seizes upon an earlier statement where Thayer spoke of "tyrannical acts, the tyrannical restrictions, and the tyrannical laws." Petitioner Brief at 60. *Amici* find no discrepancy here. Tyrannical laws *qua* laws are of no real effect unless some official or even private person "acts" pursuant to them. In addition, it is hardly a "tyrannical act" if a person decides not to enter into a voluntary contract. If anything, it is tyranny to force such private conduct. This scrap of legislative intent hardly proves petitioner's point. And if petitioner is so concerned with quoting Thayer in context, she seems content to overlook his remarks just one sentence later from Harlan's reference, where Thayer talked about "the *ability* to make a contract; . . . the *ability* to sell or convey real or personal estate." Globe at 1152 (emphasis added). Obviously, Thayer is talking in terms of legal capacities, not absolute rights.

editorials, or even a remark made by a bill's opponents to exaggerate the impact of measure to scare off votes, is nearly weightless evidence of intent by those who voted *for* the bill, just as a dissenting opinion in a court decision does not authoritatively explain the holding of the majority opinion."

3. *Judicial Enforcement.*

While Section 1 of the Civil Rights Act of 1866 was couched in declaratory terms and did not proscribe private conduct, the removal of legal disabilities would themselves remedy the private wrongs petitioner refers to in her brief. By prohibiting the states from incapacitating the freedmen from his right to make contracts, to sue, and to enjoy the equal protection of the laws, those very rights would go a long way to redress the abuses committed against the freedmen.

For example, we are told in the Schurz report that the emancipated Negroes who walked away from the plantations "were shot or otherwise severely punished. . . ." Pet. Brief at 20. By giving the Negro the right to give evidence, their attackers could be prosecuted for murder, criminal assault, kidnapping, and the like. After all, crimes of violence against slaves and freedmen went unpunished since blacks could not testify in a court of law. In addition, by giving the freedmen the legal capacity "to sue," the freedmen could now avail themselves of civil remedies and sue those who would commit violence on them by utilizing common law tort actions of assault, battery, false imprisonment, and the like.[18]

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[17] In any event, once the *Cincinnati Commercial* got its facts straight from the Ohio delegation about the scope of the bill, it changed its views in its April 16 edition. *See* Appendix B hereto. Other newspapers agreed. *See id.*

[18] Indeed, Dred Scott sued his former master Sanford for "trespass *vi et armis*" (trespass with force and arms) for assaulting him, his wife, and his two children by holding them as slaves in

As for the abuses suffered by the former slaves in their contractual affairs, those too could be remedied by both the right to contract and to sue. Thus petitioner tells us that where "contracts agreed to by the land owners contained fair terms, the employers frequently broke them." Pet. Brief at 22. However, the slaves could now sue for breach of contract, a right which they did not have as slaves. Other abuses such as "defrauding of wages," "extortion," and the like could also be addressed under common law remedies for fraud. Contracts made under duress and so forth could be voided under contract law since there was no voluntary "meeting of the minds." Forcing a freedman to work and then not paying him would subject the employer to a suit for *quantum meruit*. As for disparate treatment of the workers, petitioner states that "[b]y far the most widespread abuse was the beating or whipping of black workers." Pet. Brief at 35. Here again, recourse was now available under tort law for assault and battery.

Accordingly, the remedy for the private abuses suffered by the freed slaves flowed from the legal capacities declared in Section 1, leaving Section 2 of the Act to provide criminal penalties against state officials. Civil actions could also be taken against state officials for violation of the rights in Section 1, including the right to equal protection provided therein.[19]

Missouri. [illegible] claims he was free when he was taken to Illinois, a free state, and remained so upon his return to Missouri. *Dred Scott v. Sanford*, 112 How. 392 (1856). The Court ruled against Scott on two separate grounds, the first being that Dred Scott was not a citizen of Missouri and thus did not have the legal capacity to sue in the first place. *Id.* at 427.

[19] As previous noted, *supra* note 13, Congress was able to make itself clear when it was proscribing private conduct as well as providing private rights of action against wrongdoers. *See also* S.232 (introduced by Senator Doolittle on March 27, 1866 to enforce 13th Amendment) (including a provision in § 4 for civil suit against private wrongdoers to "recover the sum of one thousand

If petitioner is correct that Congress primarily intended to ban private discrimination and provide a civil cause of action in federal court for discriminatory and abusive treatment of the freedmen on the job, where are all the lawsuits that one would expect to have flooded the courts by the abused freedmen? There is not a single lawsuit that petitioner can point to where the abuses she recounts have been adjudicated. Surely, these abuses did not automatically discontinue the day after the law was passed, and are now only rearing their heads 100 years later. Indeed, an examination of the litigation that ensued following passage of the 1866 Act supports *amici's* interpretation of the "right to contract" clause.

The very first suit filed involving the new Civil Rights Act was instituted on April 11, 1866, just two days after its passage. In *Barnes v. Browning*, (unreported) a Negro had sued his employer for wages in Indiana state court, but the employer defended by arguing that Indiana's Constitution barred Negro immigration and declared null and void all contracts made with such persons, and that a state law stated such persons could not make or enforce contracts. *See* Flack, *The Adoption of the Fourteenth Amendment* 47-48 (1908). The court ruled that the Indiana Constitution and statute which incapacitated the Negro was void under the first section of the Civil Rights Act. *Id.* The first decision by the highest state court applying this law came shortly thereafter and also was rendered in Indiana. The Indiana Supreme Court ruled that a Negro could sue on a promissory note, striking down the laws incapacitating the black to make contracts. *Smith v. Moody*, 26 Ind. Rep. 299 (1866).

Petitioner highlights *In re Turner*, 24 Fed. Cas. 337, 1 Abb. 84 (1867) as significant because it was a civil suit brought against a white employer for failing to in-

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dollars, in addition to all damages sustained by such person, together with the costs of the prosecution"). Neither the Civil Rights Act of 1866 nor Section 1981 refers to such type of actions.

clude certain benefits in the indenture contract that the State of Maryland required to be provided in the indenture contracts for whites. Pet. Brief at 10, n.4. The petitioner cites Chief Justice Chase, sitting as Circuit Justice, as holding that the indenture violates "the first section of the civil rights law enacted by Congress on April 9, 1866." *Id.* In this instance, the petitioner neglected to use an ellipsis, for there is a comma after "1866" and the rest of the sentence reads: "which assures to all citizens without respect to race or color 'full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.'" 24 Fed. Cas. at 339. Thus, this *habeas corpus* action had the effect of striking down the discriminatory state law, and did not discuss the contract clause of the statute.

To be sure, there were suits filed by blacks against common carriers, hotels, and so forth for refusing to admit them, or for giving them second-class accommodations when they paid for first-class, and some of those suits were successful. *See* Foner Brief at 21. But none of these cases, as far as *amici* has been able to determine, discussed the contract clause of Section 1 of the Civil Rights Act of 1866. A better explanation of these cases is that under the common law, public carriers and inns had a duty to provide service to all who tendered the required fare or rate. In that regard, they functioned as state actors and were not considered private persons. *See* Cong. Globe, 43d Cong., 1st Sess. 412 (Cong. Lawrence).

In other cases, there may have been state laws that provided for disparate treatment, or there may have been laws that provided for equal treatment but which were not being followed by the carrier. *See, e.g., The West Chester and Philadelphia Railroad Company v. Myers*, 100 Pa. 209, 215 (1867) (referring to Pennsylvania's "Act of March 1867, declaring it an offense for railroad companies to make any distinction between passengers on account of race or color"). Suits may also have been

filed simply on the grounds of breach of contract or bailment.

In any event, the Civil Rights Act of 1866 was not universally understood to provide a cause of action in these situations, for it was not until Congress passed the Civil Rights Act of 1875, 18 Stat. 335 (1875), that it prohibited discrimination by public accommodations, theaters, inns, and so forth. *See* Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 Colum. L. Rev. 873 (1966). Even Senator Trumbull, who sponsored the Civil Rights Act of 1866, felt that Congress had no authority to legislate in this area. Cong. Globe, 42 Cong., 2d Sess. 3190. In the notorious *Civil Rights Cases*, the Supreme Court agreed. 109 U.S. 3 (1883).

II. *STARE DECISIS* CONCERNS DO NOT COMPEL ADHERENCE TO *RUNYON*.

Stare decisis is a judicially created doctrine that is used by the courts to justify their refusal to overrule erroneous decisions. The underlying principle of that doctrine seems to be that stability in the law and the reliance placed on erroneous decisions are preferable to correcting judicial mistakes. As Justice Brandeis observed, "[I]t is more important that the applicable rule of law be settled than that it be settled right. . . ." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932). This observation is an overstatement since this Court does not blindly adhere to *stare decisis*; otherwise, no decision would ever be reversed.

Although it is generally stated that the Court is more likely to correct erroneous constitutional decisions than statutory decisions since the latter can be more easily corrected by Congress, the fact is that this Court has frequently overruled many of its statutory cases. Since 1961 alone, this Court has overruled or materially modified statutory precedents more than 30 times. *See* Eskridge, *Overruling Statutory Precedents*, 76 Geo. L.J. 1361 (1988).

Amici submit that the *stare decisis* concerns articulated by the petitioner in this case are not compelling and that neither stability in the law nor legitimate reliance interests are served by adhering to *Runyon*.

A. *Runyon* Does Not Bring Stability To The Law.

Even though he believed that *Runyon* and *Jones v. Alfred H. Mayer Co.* were wrongly decided, Justice Stevens concurred in the former out of an "interest in stability and orderly development of the law," and because of his belief that the "moves of today" dictate liberal construction of civil rights statutes. 427 U.S. at 189, 191. Justice Stevens also cited Justice Cardozo's remarks that the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." *Id.*, citing B. Cardozo, *The Nature of the Judicial Process* 149 (1921).[20]

Amici submit, however, that this interest in stability and settled law is not compelling in this case precisely because the erroneous interpretation given Section 1981 has been unsettling and marked by instability. The petitioner in this case is asking this Court to lay yet another course of bricks on a foundation built on sand. When the Court recently decided to consider whether *Runyon* should be "modified or overruled," it did so "in light of the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U.S.C. § 1981." *Patterson v. McLean Credit Union*, 108 S.Ct. 1419

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[20] Cardozo, however, was writing in 1921 about *stare decisis* in the context of common law, not statutory law, where fidelity to judge-made law as precedence has more application. *See generally* Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L.R. 401 (1988); Maltz, *The Nature of Precedent*, 66 N.C. L. Rev. 367 (1988).

(1988). Nothing in the briefs filed by the petitioner or her supporting *amici* address these serious concerns of the Court. Rather, the briefs focus on the general aspects of the *stare decisis* doctrine.

As *amici* noted earlier, *supra* n.3, the petitioner's attempt to bring her case within the language of Section 1981 is premised on the fiction that her single contract at will is a series of multiple contracts made each work day. Other judges are experiencing difficulties in applying *Runyon* in other contexts as well. For example, in *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987), an alien brought suit against a bank for refusing to issue him a credit card partly because he was not a United States citizen. The alien sued under Section 1981 claiming that the bank refused to enter into a contract for credit with him. In an *en banc* decision, a majority of the court declined to apply *Runyon* to aliens (even though § 1981 applies to all "persons") stating:

> For the reasons expressed by Justice White in his *McCrory* dissent, and echoed by most observers who take the view that words have an ascertainable meaning, it seems to us beyond serious dispute that the reasoning in *Jones* and *McCrory* cannot stand of its own force.

Id. at 1349.

Further unresolved is the reach of Section 1981 into the countless private contracts made every day. Employment contracts include a number of personal relationships voluntarily entered into between parties. As Justice White stated in his dissent, "a racially motivated refusal to hire a Negro or white babysitter" would subject the parents to liability under *Runyon*'s reading of Section 1981. 427 U.S. at 211. *Amici*, and no doubt the petitioner as well, do not share Justice Powell's observation in *Runyon* that while the private school in that case is "clearly" covered under Section 1981, a "kindergarten

and music school . . . are clearly on other side." There is nothing clear about it.

Furthermore, since § 1981 can be invoked by whites as well as by blacks, *see McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), one is faced with the anomaly, as Justice White described in *Runyon*, of a "former slaveowner [being] given a cause of action against his former slave if the former slave refused to work for him on the ground that he was a white man." 427 U.S. at 211. Modern day anomalies can be found as well. In *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982), for example, white merchants, invoking state laws, had sued the NAACP and its local supporters in Claiborne County, Mississippi in 1972 for boycotting their stores and intimidating black customers to keep them from patronizing the targeted businesses. This Court ruled that recovery could be had for damages that were attributed to that part of the boycott that resulted in violence, but not for the peaceful aspects of the boycott protected by the First Amendment. *Id.* at 893.

Under the rationale of *Runyon*, the plaintiffs in *Claiborne* could have alleged a cause of action under Section 1981 against the NAACP. After all, by boycotting the stores and intimidating others into doing so as well, they were refusing to enter into contracts with others because of their race. In addition, a cause of action under both Sections 1981 and 1982 would clearly have been available to the blacks who wanted to patronize the stores but who were harassed by the enforcers of the boycott (the "black hats"), *id.* at 895 (*cf.* to the "black cavalry" of 1866), had their houses fired upon, *id.* at 904, (*cf. Shoare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987)), and had goods purchased in white-owned stores forcefully taken away from them. Refusals to contract with U.S. companies that do business with South Africa could subject the local governmental units or private organizations which have adopted such policies to liability under Section 1981.

The prospect of having Section 1981 apply to peaceful economic boycotts is only one of many examples that demonstrates the open-ended and unsettling nature of the Court's decision in *Runyon*. Section 1981, as interpreted in *Runyon*, would create a cause of action for all racially-motivated torts interfering with the enjoyment of any kind of contractual rights, whether caused by the other contracting party or even by third persons. The issue is not whether such results are desirable or undesirable, but whether the Congress or the courts should be making those policy decisions. Instability and uncertainty in the law will continue unless this Court returns to the text and original meaning of the statute. *See Johnson v. Transportation Agency of Santa Clara County*, 107 S.Ct. 1442, 1473 (1987) ("substitution of judicial improvisation for statutory text" in the name of *stare decisis* produces not "stability and order" but rather "instability and unpredictable expansion.") (Scalia, *J., dissenting*).

B. The Reliance Interests Are Not Compelling.

Another factor considered by the Court in deciding whether to overrule an erroneous decision is to determine whether substantial reliance has been placed on the decision in the form of settled expectations and the growth of institutions on that interpretation. This factor is related to the stability concern, since it is grounded in the notion that people expect stability in the law and plan their lives accordingly.[22]

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[22] The notion that society expects stability in the law seems to be a curious one inasmuch as Congress, who makes the law, is not only able to change or modify it, but often does so in many regulatory areas which greatly affect the reliance interests of businesses, consumers, and taxpayers. Since society has come to expect such changes in the law, and often lobbies for or against them, why should courts be loathe to change "the law" when in fact, all they are doing by reversing an erroneous statutory interpretation is simply restoring the law to what Congress intended it to be in the first place? Furthermore, if the Court is not hesitant to upset expectations and stability in the law when it examines the validity

of the consistent exercise of power by the other coordinate branches, *see, e.g., Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), it should not be so reluctant to do the same when the Court itself oversteps its role and usurps the legislative powers of the Congress. Congress should not be continuously pressed into service to correct this Court's mistakes since Congress is faced with other pressing problems and a "docket" no less crowded than this Court's.

Just as Justice Stevens stated in his concurring opinion in *Runyon*, that "it is extremely unlikely that reliance upon *Jones* [*v. Alfred H. Mayer Co.*] has been so extensive that this Court is foreclosed from overruling it," 427 U.S. at 190, so too is it unlikely that the reliance on *Runyon* has been so extensive to preclude its modification or correction. Since *Runyon* involves applying Section 1981 to *prospective* contractual rights, there will be no upsetting of contracts already made. Breaches in contracts are actionable under normal contract law, and discrimination in employment is extensively covered by Title VII and numerous state laws.[23]

If anything, *amici* submit that in the area of employment law, expectations and institutions have been established under Title VII and state laws that provide for carefully crafted administrative and judicial procedures to resolve employee disputes, including conciliation provisions. These reliance interests must also be

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[23] State laws prohibiting discrimination are in many cases far more expansive than federal legislation. *See, e.g., Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (D.C. Ct. App. 1987) (local human rights law requires religious school to provide facilities and assistance to homosexual student group despite school's religious objections). Indeed, since Section 1981 originally was directed at the states and rooted in concerns of federalism, its non-application to private conduct would not make it a dead letter or "nullity" as petitioner suggests. Rather, it would recognize that the primary purposes of § 1981 have been realized and that states are indeed providing protections well beyond § 1981, as the *amici* brief filed by the 47 State Attorneys General ably demonstrates.

taken into account. In addition, Section 1981 allows for awards of punitive damages which may be abused."

C. Congress Has Not Affirmatively Adopted *Runyon*'s Interpretation of Section 1981.

As part of the reliance component of the *stare decisis* argument, petitioner cites a series of legislative developments in the Congress over the years in the civil rights area, and concludes from this chronology that it is "clear that Congress adopted the body of [case] law interpreting sections 1981 and 1982, including application of those provisions to the terms and conditions of employment." Pet. Brief at 97. Congressional *amici* supporting petitioner similarly assert that "Congress Has Affirmatively Endorsed This Court's Interpretation of Section 1981." Point III of *Amici* Brief at 20. Congress has done no such thing.

While *amici* are aware of the general proposition that "Congress is presumed to adopt judicial interpretation of a statute when that statute is re-enacted," *Shapiro v. United States*, 335 U.S. 1, 16 (1948), the fact of the matter is that since 1874, Congress has never re-enacted Section 1981. Admittedly, Congress has enacted related civil rights measures such as the Equal Employment Opportunity Act of 1972 and the Civil Rights Attorneys' Fees Awards Act of 1976, in light of judicial interpretations of Section 1981, but there are many reasons for Congressional inaction or acquiescence other than an agreement with those decisions. As Justice Scalia correctly observed in his dissent in *Johnson v. County of Santa Clara*:

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[20] The argument by petitioner and *amicus* American Bar Association that lawyers have relied on Section 1981 in advising their clients of possible avenues of relief for alleged discrimination they may have suffered is of no consequence. Pet. Brief at 104. If that were true, then no case would ever be overturned since presumably lawyers are always advising their clients on what the law is (and more likely what the law should be) as embodied in the erroneous precedent at the time they gave their advice.

> The "complicated check on legislation," The *Federalist* No. 62, . . . erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the *status quo*, as opposed to (2) inability to agree upon how to alter the *status quo*, (3) unawareness of the status quo, (4) indifference to the *status quo*, or even (5) political cowardice.

107 S. Ct. at 1473 (1987). *See also Cleveland v. United States*, 329 U.S. 14, 21 (1946) (Rutledge, J., concurring).

For example, the petitioner discusses at length Senator Hruska's proposed amendment in 1972 to the Equal Employment Opportunity Act amending Title VII of the Civil Rights Act of 1964, making Title VII the exclusive remedy for employment discrimination. Senator Hruska's amendment was defeated by the Senate after Senator Williams and Senator Javits stated, *inter alia*, that litigants should not be forced to seek remedies in only one place when they frequently "face a large and powerful employer." 118 Cong. Rec. 3372. Shortly before the vote was taken, Senator Williams forcefully argued that Mr. Hruska's amendment "will repeal the first major piece of civil rights legislation in this Nation's history. We cannot do that." *Id.* at 3371.

The vote on Senator Hruska's amendment was 33 Yeas, 33 Nays, and 33 not voting. *Id.* at 3373. This evenly split vote in 1972 by one body of the Congress is hardly a ringing Congressional endorsement of judicial opinions that Section 1981 provides a private cause of action, especially since the vote preceded the Supreme Court's decisions in this area. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 459 (1975), and *Runyon*, decided in 1976. The vote is also of dubious weight since some of the negative votes may have been cast on the basis of Senator Williams' erroneous statement that Senator Hruska's amendment "would repeal" Section 1981. Senator Hruska's amendment did not propose to repeal 1981, but instead provided for *alternative* rather than

multiple remedies. *See* Cong. Rec. at 3173. In addition, Senators voting "nay" may not have wanted to "repeal" a statute that forbade discrimination by public officials, or they may have wanted alternative remedies available for suits against small companies, but multiple remedies against the "large and powerful employer" contemplated by Senator Williams. Since this legislative issue simply was not presented cleanly to the Senators, their intent cannot be discerned.

On the House side, Congressman Erlenborn offered a substitute bill for the bill reported by the House Judiciary Committee. Erlenborn's bill also contained a provision making Title VII an exclusive remedy similar to Senator Hruska's amendment. See Pet. Brief at 87. That substitute bill passed the House by 200 to 195. 117 Cong. Rec. 32111. In the Conference Committee, the House exclusive remedy provision was dropped, and the Equal Employment Opportunity Act of 1972 was passed. The final vote for this law can hardly be characterized by the petitioner as one where "Congress endorsed the judicial interpretation of section 1981" as applying to private employers.

The other major piece of legislation that petitioner cites as evidence of Congress's adoption of *Runyon* is the passage of the Civil Rights Attorneys' Fees Awards Act of 1976. That law was designed to remedy this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) which held that ordinarily attorneys' fees will not be awarded absent explicit statutory authorization. The legislation as passed, 42 U.S.C. § 1988, merely provides that a court may award attorneys' fees as costs for civil actions that might be brought under §§ 1981-1983, 1985, 1986. Since Section 1983 already provides for civil actions against state officials, petitioner argues that Congress meant the law to apply to civil actions brought against private individuals under 1981. A vote for this measure does not constitute Congressional endorsement of the *Runyon* decision any more than the vote in 1972 on the EEO Act.

Congressmen may have voted for the legislative package because they supported the award of attorneys' fees under sections other than § 1981, but did not want to cast a negative vote against the entire bill. Others may have felt that the *Runyon* was wrongly decided, but that if Congress was going to allow for attorneys' fees in all these cases, it should be allowed across the board.[28]

If, as we contend, this Court should reverse or modify *Runyon*, Congressional *amici* supporting respondent are prepared to debate and enact whatever legislation is necessary to remedy any "gaps" in the law. Indeed, with a virtual veto-proof number of Senators supporting the petitioner as *amici*, and a substantial number of members of the House of Representatives, any "gap" would surely not go unfilled. While there is a risk that any "remedial" legislation may go far beyond the ruling in *Runyon*, as was done in the aftermath of *Grove City College v. Bell*, 465 U.S. 555 (1984), and thus may cause some delay in the legislative process, that is the price one must pay if we are to show fidelity to the separation of powers and the Constitution which reposes "all legislative Powers" in the Congress. Art. I, sec. 1.

In contrast, Congressional *amici* supporting petitioner appear all too willing to allow the Court to usurp their legislative powers:

> The Congress' primary role in lawmaking under the Constitution dictates that any change in the meaning of the statute be effected legislatively rather than judicially. In exercising its constitutional power to legislate, the Congress must be able to rely on the stability of the Court's interpretations of its statutes. For this reason, *stare decisis* . . . operates with its greatest strength where a statutory interpretation, such as *Runyon*, is concerned.

Congressional Brief at 3.

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[28] While petitioner cites a House Judiciary Committee Report discussing Section 1981 cases, the *Runyon* decision was not listed. Pet. Brief at 93.

It is especially important that the Court *correct* erroneous decisions that expand the intended scope of statutes in areas that generally cover "good government" topics such as environmental, civil rights, and consumer protection laws, not only because Congress has a full calendar already and cannot always deal with erroneous decisions, but because of the additional burden placed on the passage of correcting legislation perceived to be "cutting back" in these areas when the law is only being restored to its original meaning. Thus, by leaving *Roegen* intact, the Court would in essence be given an incentive to read such statutes broadly rather than narrowly, allowing the law to be amended judicially in one direction in a ratchet-like manner. Better for the Court to err on the side of judicial restraint and fidelity to the statute, such as it did in *Gruver City* and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (ruling that Title VII did not cover discrimination based on pregnancy), and thereby allowing the Congress to expand the statute's reach if it chooses, rather than the other way around and usurping Congress' powers.

CONCLUSION

The integrity of and respect for this Court are enhanced by following the rule of law. In deciding this case, the Court should not succumb to what it perceives, either rightly or wrongly, to be the "moves of the day." For the reasons stated herein, the decision in *Roegen v. McCreary* should be reconsidered, and either be overruled or modified.

Respectfully submitted,

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APPENDIX A

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members and supporters throughout the United States. WLF engages in litigation and administrative proceedings in matters promoting the free enterprise system and the economic and civil rights and liberties of individuals and businesses.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination.

In its pursuit of its view that the equal protection clause and the civil rights laws protect all citizens against discrimination, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in the area. *See e.g., Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *City of Richmond v. Croson*, No. 87-998 (S. Ct. 1988).

Congressional *amici* Congressmen Henry Hyde, *et al.*, are here to assert and preserve their legislative interests under Article I of the Constitution. They are concerned that the Court has all too often usurped the powers of the Congress in adjudicating cases before it, and desire to have this Court perform its function under Article III by faithfully interpreting the statutes of Congress as enacted.

The Lincoln Institute for Research and Education, named after Abraham Lincoln, was founded in 1978 to study public policy issues that impact on the lives of black middle America, and to make its findings available to elected officials and the public.

The Institute, based in Washington, D.C., aims to reevaluate those theories and programs of the past

decades which were highly touted when introduced, but have failed to fulfill the claims represented by their sponsors—and in many cases, have been harmful to the long-range interest of blacks. The Institute is dedicated to seeking ways to improve the standard of living, the quality of life and the freedom of all Americans, and has also appeared as *amicus* in *City of Richmond* v. *Croson*.

Amicus the Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* in this Court on several occasions in cases involving individual rights.

APPENDIX B

Cincinnati Commercial, April 16, 1866 (p. 4)

"The Civil Rights Bill reduced to the facts and adapted for practice does not seem to have the portentous proportions which it assumed in theory while under discussion. Congressmen who support it declare that it has no operation whatever in three-fourths of the loyal States (including Ohio) and none in three or four of the rebel States, that it does no more than our military commanders are doing in the Southern States where the Black Codes are unrepealed and is intended a law simply authorizing to be done what the President is doing. A few months experience will develop the scope and bearing of this measure and possibly may go far to settle the differences between the President and Congress by showing that they were in many particulars unsubstantial."

Philadelphia North American, April 10, 1866 (p. 1, col. 1)

"It secures to all such, without any distinction of race or color, the right to testify in courts of justice, or in law proceedings of any kind; to sue and be sued; to plead and to be impleaded; to hold property; to conduct business; to be free from outrage in person or property, and to enjoy all the liberties peculiar to our institutions except suffrage. This does not, however, include any right to sit on juries or to hold office, or to go in any car, coach, hotel, church, public place, etc., where the local regulations prohibit it. It, in fact, is only a law to protect the rights of persons and property. It does not undertake to deal with political rights at all, nor does it meddle with the social position of any race or class."